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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/830,176	04/21/2004	Joel D. Martz	3285A	7731
7590 DAVID M. WARREN 655 OAKLAND AVE. CEDARHURST, NY 11516				
09/18/2007				
EXAMINER				
SINGH, ARTI R				
ART UNIT		PAPER NUMBER		
1771				
MAIL DATE		DELIVERY MODE		
09/18/2007		PAPER		

**Please find below and/or attached an Office communication concerning this application or proceeding.**

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**BEFORE THE BOARD OF PATENT APPEALS  
AND INTERFERENCES**

Application Number: 10/830,176  
Filing Date: April 21, 2004  
Appellant(s): MARTZ, JOEL D.

\_\_\_\_\_  
Mr. David Warren  
For Appellant

**EXAMINER'S ANSWER**

This is in response to the appeal brief filed 06/01/2007 appealing from the Office action mailed 03/23/06.

**(1) Real Party in Interest**

A statement identifying by name the real party in interest is contained in the brief.

**(2) Related Appeals and Interferences**

The examiner is not aware of any related appeals, interferences, or judicial proceedings, which will directly affect or be directly affected by or have a bearing on the Board's decision in the pending appeal.

**(3) Status of Claims**

The statement of the status of claims contained in the brief is correct.

**(4) Status of Amendments After Final**

The appellant's statement of the status of amendments after final rejection contained in the brief is correct.

**(5) Summary of Claimed Subject Matter**

The summary of claimed subject matter contained in the brief is correct.

**(6) Grounds of Rejection to be Reviewed on Appeal**

The appellant's statement of the grounds of rejection to be reviewed on appeal is correct.

**(7) Claims Appendix**

The copy of the appealed claims contained in the Appendix to the brief is correct.

**(8) Evidence Relied Upon**

**(9) Grounds of Rejection**

The following ground(s) of rejection are applicable to the appealed claims:

***Claim Rejections - 35 USC § 103***

Claims 1-13 are rejected under 35 U.S.C. 103(a) as being unpatentable over USPN 6074738 issued to von Fragstein et al.

USPN 6074738 discloses a flexible laminate, which are especially, suited for water-resistant but water vapor permeable textile materials (column 1, lines 10-15). In the broadest aspects of the invention a microporous polymer layer (a) is adhered to an air impermeable polymer layer (b). The microporous layer has voids through the internal structure, which forms an interconnected continuous air path from one side to another. Both layers may chemically be the same, however in a preferred aspect the microporous polymer layer is polytetrafluoroethylene (column 2). Said layer can also be made of polyethylene or polyamide or polyesters (column 3, lines 47-53). The layer thicknesses, densities and pore size of the layers can vary depending upon the application (column 6, lines 43-45). In Example 11 the composite that is prepared is a microporous PTFE having a pore size of 0.25 microns and a weight of 20 g/m<sup>2</sup>, which is coated with a polyurethane resin. This example combined with that of Example 3 indicate that the thickness of the microporous layer is a lot thicker than that of the coating layer. However, it is the position of the Examiner that thickness of the composite or its individual layers are all result effective variables and that optimizing the thickness of any of the layers would directly affect the strength of the laminate. Therefore, it would have been obvious to a skilled artisan to use a coating in the thickness of 0.5 – 10 microns in the laminate of von Fragstein et al, since it has been held that discovering an optimum value of a result effective

variable involves only routine skill in the art. *In re Boesch*, 617 F. 2d 272, 205 USPQ 215 (CCPA 1980). In the present invention, one would have optimized the thickness of the coating layer to be 0.5-10 microns, motivated by the desire to obtain a composite that is flexible.

With regard to the ASTM test standards in claims 8-11, it is the position of the Examiner that if structurally and chemically the article is the same then testing it against any standard should provide the same test results and would be inherent to article.

#### **(10) Response to Argument**

Appellant's arguments filed in this brief have been fully considered but they are not persuasive. Appellant's only traversal is that the coating used by the cited art is not a film, and Appellant attempts to clarify the difference between a film and coating by describing the different scenarios, which is appreciated. However, Appellants specification does not provide any limiting disclosure, therefore the definition of a film or coating must be given its broadest reasonable meaning. Additionally, Appellant has not shown otherwise within the specification, claims or drawings. Thus, it is the position of the Examiner that Appellant's specification does not define that a film can't be a coating or that a coating is not a film. Appellant's specification does not define a coating or a film –which is being traversed, and therefore the usual industry know meaning of film and coatings are used. (In the most laymen of definitions such as that found in Merriam Webster's Dictionary, they define "film" as a thin covering or coating and "coating" as something that covers, both of which are met by the layer of cited art. In fact, If Appellant is choosing to define these terms then the specification must reflect the same. Additionally, The arguments of counsel cannot take the place of evidence. *In re De Blauwe*, 736 F.2d 699, 705, 222 USPQ 191, 196 (Fed. Cir. 1984). Further, with post processing steps

Art Unit: 1771

(evaporation of the solvent or heat pressing through rollers) or once the final product has solidified, a skilled artisan would not be able to tell the difference if a film or a coating was applied. Furthermore, although Appellant is calling this layer a film it really is a coating, and not a preformed film.

Appellant's last argument is that the chemistry of the layers are not the same and states that von Fragstein does not teach the use of polyurethanes. Appellant is incorrect in their deduction, as von Fragstein does teach the use of polyurethane at column 3, lines 52. Therefore, this traversal is also not found to persuasive.

**(11) Related Proceeding(s) Appendix**

No decision rendered by a court or the Board is identified by the examiner in the Related Appeals and Interferences section of this examiner's answer.

For the above reasons, it is believed that the rejections should be sustained.

Respectfully submitted,

/Ms. Arti Singh/  
Primary Examiner, Art Unit 1771

**Conferees:**

/Terrel Morris/  
Terrel Morris  
Supervisory Patent Examiner  
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/Romulo H. Delmendo/  
Mr. Romulo Delmendo, Appeals Specialist